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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. W287/1991

BETWEEN	KISHAN WILLIAMS (BY his next friend DOREEN TAYLOR)	PLAINTIFF
A N D	KENNETH KELLY	DEFENDANT

Ainsworth Campbell for the Plaintiff

Patrick Foster instructed by Dunn Cox & Orrett for the Defendant

Heard: February 9 & September 19, 1994.

Judgment

Theobalds J.

By a statement of claim dated 15th November 1991 the plaintiff, Kishan Williams, by his next friend Doreen Taylor, sought to recover damages for negligence against the defendant Kenneth Kelly. The claim arose out of a motor vehicle accident which took place along Brunswick Avenue called by many Walks Road in the parish of Saint Catherine a few miles outside of Spanish Town as one proceeds in the direction of Bog Walk. In fact this road forms part of the main road to the North Coast and is a continuation of the Spanish Town by-pass. It was the plaintiff's case that some time after 12:00 noon on the 21st day of November 1990 he was walking along the side-walk of Brunswick Avenue on his way to the Crescent All Age School. He was accompanied by two school-mates both of whom lived very near to him, attended the same school albeit they were in a different class from himself. This school is on the same side of Brunswick Avenue as the plaintiff's home so there really was no necessity to cross the road in order to get to school. The plaintiff however insists that he was on his way to school and he was late for school that afternoon. It was in this scenario that the plaintiff says his two friends ran across the street and were calling him while they stood on the other side. Like a dutiful youngster he refused, heeding the instructions of his mother to "wait till the car pass and the road is clear." At the time his two companions ran across the road the plaintiff had seen a car coming. This car was very far from them and from the plaintiff's account they made it safely. The plaintiff then looked left and right. Other school children were on the road. The plaintiff says he saw no car coming.

He then started to walk into the road - he was "walking a little fast not running." When he was "very very close to the white line he indicated about one inch, was when he first saw the car. This car according to the plaintiff was coming from the direction of Spanish Town and going towards Bog Walk. It turns out that the car driven by the defendant, and this was his evidence, was travelling from Bog Walk going towards Spanish Town. The defendant, a businessman from Rosemount, Linstead was accustomed to make this trip twice a week in order to buy parts and transact business for the heavy equipment firm to which he was employed. It was suggested to him that he had in fact come into Kingston about 10:00 a.m. that day and was on his way back to Linstead when the accident happened. No evidence was called to support that suggestion and I accepted the plaintiff as truthful in relation to that issue. I shall return to that aspect of the matter later on. There are three aspects of the plaintiff's case which merit unfavourable comment. Firstly he is wrong about a matter as fundamental as the direction from which the defendant's car came. Secondly he is untruthful when he says he was on his way to school. In reply to a question from me he stated quite clearly that he was "going over my auntie". He may have left home for school but certainly when the accident occurred he was not on his way to school. Thirdly and finally no explanation has been given as to why "the two little boys who still go to the same school and who he still sees on a regular basis" have not been called as witnesses. Indeed no witness has been called to support the plaintiff. These two boys live on the same Brunswick Avenue as the plaintiff and they were walking together from his home. Indeed ever mindful of this weakness before adjourning on the afternoon of the 9th I enquired whether the plaintiff would be calling witnesses, only to be told that one Trevor Watson might be called or a man on crutches. On the following morning (10th) neither was forthcoming. Apart from formal evidence from his mother that closed the case forth with plaintiff.

Before embarking on a critical analysis of the defence it would be appropriate, in my view to deal with the law in relation to negligence in running down cases. In order to establish a case of negligence the onus is on the plaintiff to prove on a balance of probability that the

defendant/driver omitted to do something which a prudent and reasonable driver would have done or did something which a prudent and reasonable drive would not have done. See the old cases of Blyth v Birmingham Waterworks Co. (1856) 11 Ex. 731, 784 and Smith v L & S.W Rail Co. (1870) L.R.5 see p 98 at p 102. There are in addition further concepts as to the duty owed by all users of the road. This case was pitched on the basis that a very high duty of care is owed where children are concerned. It was submitted that you cannot be right unless "they drop out of the sky or run from some place" (The underlining is mine). The defence conceded that a duty of care was owed to the plaintiff but it was not an absolute one. Indeed as I write I recall at the trial being critical of counsel on both sides for omitting to provide any assistance by way of decided cases on the question of liability. The defendant impressed me from the witness box as being a responsible driver. This was so inspite of his evidence that he first saw the children standing on the sidewalk at a distance of about fifteen feet from his car. Clearly this estimate offends against common sense as going at 30 miles per hour he would have long gone past the spot before the plaintiff could have run across the road and come into contact with his car. The entire episode has the stamp of a sudden unexpected movement in which the defendant took immediate evasive action and possibly saved the child's life. To be driving along a main arterial road at 30 miles per hour is not indicative of any want of care as the unchallenged evidence is that the school was a distance of half to three quarter mile from the road. Failure to sound one's horn which incidentally has not been alleged was attributed by the defendant to the suddeness of the "hit and run" movement of the plaintiff. This is a game commonly known as "last lick" not unfamiliar to children. I believe the defendant when he says he first became conscious of the boys when the plaintiff hit one and ran. They were all on the sidewalk initially and the judgment on appeal in Moor v Royner (1975) R.T.R 127, C.A is most applicable here:

> "the test to be applied to the facts was this: would it have been apparent to a reasonable man, armed with common sense and the way pedestrians, particularly children, are likely to behave in the circumstances such as were known to the defendant to exist in the present case, that he should slow down or sound his horn or both?"

Clearly the answer is no. 30 miles per hour or thereabouts is not a unreasonable speed, boys standing on a sidewalk is not an unfamiliar sight. It was held in Davies v Jousneaux (1975) 1 Lloyd Rep. 483 C.A. that it would be unreasonable "to place a duty on a motorist to sound the horn virtually whenever they see a pedestrian, regardless of whether the pedestrian is manifesting an intention of leaving the pavement and dashing across the road." This plaintiff on my findings of facts certainly did not manifest any such intention he simply ran across without looking. He himself said he neither looked left or right.

There are two features of evidence which would indicate the unlikelihood that the plaintiff is speaking the truth. He agreed that his body came in contact with the right side of the car. This would indicate that he ran into the car rather than that the car ran into him. Secondly the medical certificate tendered shows the concentration of injury is to his left leg and arm, such an injury is more likely to result from a car coming from Bog Walk to Spanish Town than from Spanish Town to Bog Walk as the plaintiff alleged. I believed the defendant when he said "I took up boy with help of another motorist from opposite direction and who almost ran into him". It may well have been this car that the plaintiff saw and in his movement of agony assumed hit him. Finally item (4) under particulars of injuries in the statement of claim speaks of "concussion". The medical certificate tendered by the plaintiff states "no history of loss of consciousness or E N T bleeding". Question? Was this laying the foundation for brain damage and possible substantial damages if successful? I find the plaintiff entirely to blame for his unfortunate accident. On his own evidence he had been properly instructed as to the correct way to cross the street. He chose to ignore these instructions.

The defendant did what he could to avert the consequences of the plaintiff's folly and by quick evasive action by braking and swerving left as soon as he became aware that the plaintiff was running into his path possibly saved the plaintiff's life. No blame whatever can be attributed to him. There will be judgment for the defendant with costs to be taxed ir not agreed.